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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 988 129

ALL AMERICAN AIRWAYS, INC., ASSOCIATED AIR TRANSPORT, INC., BLATZ AIRLINES, INC., COASTAL CARGO, INC., MODERN AIR TRANSPORT INC., QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRWAYS, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE,

Petitioners,

v.

UNITED AIR LINES, INC., EASTERN AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL., TRANS WORLD AIRLINES, INC., AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., NATIONAL AIRLINES, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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All American Airways *et al.*, petitioners, pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled cause on April 7, 1960.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit has not yet been officially reported. It is appended to this petition, p. 7a. The opinions of the Civil Aeronautics Board have not yet been officially reported, but appear at pages 1100A, 1273A, and 1295A of the Record.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit is dated and was entered on April 7, 1960. No motion for rehearing was filed. This petition is filed within 90 days from the date of the order of the court below. Jurisdiction is conferred on this court by 28 U.S.C. Section 1254(1) and by Section 1006(f) of the Federal Aviation Act of 1958, 72 Stat. 796, 40 U.S.C. Section 1486(f). Federal jurisdiction exists because the case involves the review of an order of the Civil Aeronautics Board.

QUESTIONS PRESENTED FOR REVIEW

The Civil Aeronautics Board [1] issued certificates of public convenience and necessity to 23 supplemental carriers to provide "supplemental air service." [2] The Court of Appeals set the certification aside. The questions are:

1. Section 401(d) of the Federal Aviation Act provides that "The Board shall issue a certificate of pub-

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[1] Sometimes herein called "the Board."

[2] "Supplemental" service is defined as the operation by an air carrier of any number of charter trips, but not more than ten individually-ticketed or way-billed flights between the same two points in any one month.

lic convenience and necessity authorizing the whole or any part of the transportation . . . if it finds . . . such transportation is required by the public convenience and necessity." Section 401(e) provides that each certificate "shall specify . . . the service to be rendered."

(a) When the Board finds that the public convenience and necessity require supplemental service, does the fourth sentence of Section 401(e) (which provides that no term or condition of a certificate shall restrict the right of an air carrier to add schedules) prevent the Civil Aeronautics Board from issuing a certificate for supplemental service? and,

(b) Does the first sentence of Section 401(e) absolutely require the Civil Aeronautics Board to name, by city name, the points to be served, or can the Board, as it did, issue a certificate for service between any point in one state and any point in any other state, and define the term "point" in general terms?

2. When the Civil Aeronautics Board finds a carrier to be fit and able to engage in supplemental air transportation, must the Board also make findings that the carrier is fit and able to provide the maximum service authorized by the certificate, or is the finding of ability to perform minimum service sufficient?

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act here involved are set forth in the Appendix, p. 1a, to this petition. In this petition, it is often referred to as the Act. The provisions of the Federal Aviation Act do not differ in pertinent part from the predecessor statute, the Civil Aeronautics Act of 1938.

STATEMENT OF THE CASE

This case involves the very existence of the supplemental air carriers. The Civil Aeronautics Board has found that these carriers, as a class "have provided useful and necessary service in meeting fluctuating demands for air transportation"; "represent a significant part of the nation's air transport system" and "have rendered invaluable service to the military, both in the Berlin and Korean Airlifts, as well as in domestic charter operations. The continued existence of their fleet is of real value in terms of the national defense." (R. 573A)

Air carriers may provide air transportation only under operating authority issued by the Civil Aeronautics Board. The Board can issue operating authority in the form of an exemption, or a certificate.

The petitioners and other supplemental carriers have been operating for some 15 years under general or special exemption orders issued by the Board. From time to time, various changes in the operating authority were made by the Board. On September 21, 1951, a major proceeding was undertaken to determine the place of supplemental carriers[3] in the air transport field. (R. 1A) That is this case.

After lengthy public hearings, the Board issued an interim opinion in 1955, directing the issuance of an individual exemption order[4] to each supplemental carrier.[5] The Board's order was appealed and the United

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[3] Then called "Large Irregular" or "Irregular Transport" carriers.

[4] Called a "Supplemental Air Carrier Interim Operating Authorization."

[5] The form of this individual exemption appears at page 827A of the Record.

States Court of Appeals held that (1) the Board had authority to issue exemptions, but (2) the findings were insufficient to show what circumstances "would make certification an undue burden" on the supplemental carriers so as to warrant the Board's use of the exemption power.[6]

In setting aside the exemptions granted to supplemental carriers, the Court of Appeals practically invited the Board to issue certificates to the supplemental carriers, saying, "Neither can we ascertain why the Board is of the opinion that the certification of these carriers is not in the public interest." Although the order of the Board was reversed, the issuance of the mandate was stayed, pending the conclusion of the case before the Board. Since 1955, the supplemental carriers have been operating under their individual exemptions (and, in overseas and foreign air transportation, under other exemption orders.) This operating authority will be set aside, if the Court of Appeals issues its mandate.

Further hearings in the Board's investigation were completed, and, on January 28, 1959, the Board decided that it would no longer use the exemption provisions of the Act to regulate supplemental carriers, but, instead, would authorize their continued operation by "Certificates of Public Convenience and Necessity for Supplemental Air Service."[7]

Certain regular route air carriers, the respondents here, filed petitions for review of the Board's order.

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[6] *American Airlines* v. *Civil Aeronautics Board*, 98 U.S. App. D.C. 348; 235 F.2d 845 (1956), cert. denied 353 U.S. 905 (1957).

[7] The form of such a certificate appears at page 1280A of the Record.

contending, in effect, that the Board improperly issued certificates and failed to apply appropriate standards to determine the fitness and ability of the supplemental carriers to which certificates were issued. The petitioners intervened in the case in support of the Board's order issuing them certificates.

The court below reversed the Board for two reasons. First, the court held, as a matter of statutory interpretation, that the Board does not have the legal power to issue certificates for supplemental air service. Second, the court held that the Act does not permit the Board to issue a certificate for supplemental service to a carrier already providing minimum service unless it finds the carrier to be qualified to provide maximum service. Circuit Judge Fahy dissented on this latter point.

In one aspect, this case is a facet of the battle between big business and small business. The regular route carriers believe that they should retain for themselves all individually-ticketed traffic simply because they were originally issued certificates under a grandfather clause. The supplemental carriers contend that the supplementals are entitled to continue to share in the traffic and business which they developed, and that they should now be certificated to continue to provide their service. The issue was resolved before the Board in favor of the supplemental carriers. The court below, however, interpreted the Federal Aviation Act to mean that certificates can be issued for only regular route and not for supplemental operations.

Petitioners now seek review by this Court.

REASONS FOR GRANTING THE WRIT

I. THE FUTURE OF THE SUPPLEMENTAL AIR CARRIER INDUSTRY IS AT STAKE.

The supplemental air carriers and the Civil Aeronautics Board are in a quandary. For nine years, the supplemental carriers have been trying to attain a recognized and definite status. When the Board decided to issue individual exemptions to the supplemental carriers, the Court of Appeals set the exemptions aside. Finally, after protracted hearings, the Board decided to issue certificates to the carriers. Then the Court of Appeals set the certificates aside. The sweeping effect of this decision is no better shown than in the statement of the Chairman of the Civil Aeronautics Board to the Congress:

> "It therefore appears that, to put it very moderately, there is at least grave doubt as to whether the carriers can be continued in anything resembling their present posture under either certificated or exemption authority."[8]

There are 25 supplemental carriers, with total revenues of $51 million in 1959. These carriers, as the Board has found, represent a significant part of the nation's air transport system and "the continued existence of their fleet is of real value in terms of the national defense." (R. 573A)

The decision of the court below strikes a body blow to the whole policy of the Board to continue the healthy growth of the supplemental carriers. Indeed, the result of the two decisions of the court below is to set

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[8] Statement of Whitney Gillilland, Chairman of the Civil Aeronautics Board, before the Subcommittee on Transportation and Aeronautics of the Committee on Interstate and Foreign Commerce, House of Representatives, Relative to H.R. 7593, May 23, 1960.

aside all operating authority of the carriers, and to severely limit, if not prevent, the Board from developing an essential part of the air transport industry which is responsive to the public convenience and necessity.

Supplemental air carriers are an important part of the air transport industry. They perform charter and flexible service flights which other carriers cannot and do not provide. They need certificates in order to provide a stable basis for their businesses, to prove that they are in business, and to convince bankers and others that they will continue in business. When the whole future of an important segment of an industry is at stake, the public interest is sufficiently involved to warrant consideration of the case by this Court.

II. THE COURT OF APPEALS AND THE CIVIL AERONAUTICS BOARD HOLD CONFLICTING VIEWS ON THE PROPER INTERPRETATION OF IMPORTANT PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958.

The Civil Aeronautics Board interprets the Federal Aviation Act to authorize it to issue certificates for special types of services, including such restricted types as helicopter service, local air service, property only service, and supplemental air service. The court below has so interpreted the Act as to cast doubt on the validity of all certificates which the Board has issued for special services, not just the certificates for supplemental air service.

There are two types of service which comprise supplemental service. The first is individually-ticketed or way-billed flights, not in excess of ten per month between the same two places. The second is charter service between any points which the customer may direct.

The Board issued one certificate embodying both types of service.

A. The power to issue a certificate authorizing ten trips.

The lower court held that the Board could not issue a certificate authorizing ten trips per month between the same two places. Its holding is based on a literal reading of that part of the fourth sentence in Section 401(e) of the Act which reads that "[n]o term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules." But, the sentence does not stop there. The statutory provision is that "[n]o term, condition or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities *for performing the authorized transportation and service . . .*" (Emphasis added) As this Court held in *Crescent Express Lines* v. *United States*, 320 U.S. 401, the provision has application only in the context of the service specified. The Board has held, and we submit rightly, that a certificate for supplemental service does not conflict with the fourth sentence. The carrier may still schedule his ten trips as the demands of the public and the development of his supplemental business shall require.

The Board recently issued a certificate for helicopter service which expressly authorized the carrier "to engage in air transportation, utilizing rotary-wing aircraft."[9] If the court below is right, then the fourth sentence of Section 401(e) would invalidate the certificates for helicopter service, because the certificate

[9] *Los Angeles Airways Renewal Case*, Docket No. 8178, Order E-12832, July 28, 1958.

restricts the carrier's right to change equipment. Thus, not only is supplemental service directly involved here, but the power of the Board to issue certificates for various types of special services is questioned. If the decision of the court below is not changed, the Board will be in a straight-jacket and its power to issue certificates will be limited to regular route services, even though the public convenience and necessity require other types of services. This would be contrary to the purposes of the Federal Aviation Act, which is a promotional and developmental statute for all aviation, not just regular route carriers.

B. The power to issue a certificate without naming points by city name.

In certificating the supplemental service, the Board authorized the carriers to provide service "between any point in any state of the United States or in the District of Columbia, and any other point in any state of the United States or in the District of Columbia." It then carefully defined "point" as "a single airport or place where aircraft can be landed or taken off, including the area within a 50-mile radius of such airport or place" and, in the case of Alaska, defined the whole state of Alaska as a single point in order to prevent supplemental operations between any two places in Alaska.

The court below reversed the Board in this respect. The court below looked only at a part of the first sentence of Section 401(e) of the Act, which reads, "Each certificate . . . shall specify the terminal and intermediate points, if any, between which the carrier is authorized to engage in air transportation . . ." The Court of Appeals thought that the authorization in

the certificate was not a specification of points. It completely refused to answer the argument of the Board that this sentence was not intended to limit the Board's power to confer or to describe a grant of authority and simply requires that "a certificate must indicate specifically the service which it authorizes both in geographic and in functional terms." (R. 1129A-1130A)

The court below overturned a long-established administrative policy.[10] The thrust of this argument is that the Court of Appeals misconstrued the Act. Certainly, the Congress did not require the Board to name every airport in the country in order to issue a certificate for supplemental air service. As the Board said in its opinion, "However, it would be impracticable to compile and list literally thousands of points in these certificates, for the supplemental service found required is plainly not a route service and would involve the listing not only of those points now named in route certificates, but also points not heretofore certificated. To name all points, apart from the great number involved, would serve no useful purpose and would lead only to confusion. We do not believe that the Act

[10] The Board, in its opinion said, "The Board has on various occasions specified in certificates the points between which transportation was authorized by means other than the conventional listing of points by their proper names in a linear route. Thus, in the *Alaska Air Transportation Investigation*, the Board certificated a number of carriers to provide air transportation between all points within delineated areas; e.g., 'all points within the First Judicial Division of the Territory of Alaska.' A decade later, similar certificate authority to provide service between 'all points' within defined areas was issued several carriers in the *Alaska Route Modification Case*. And in the *Reopened Samoan Airlines Case*, the Board granted certificate authority for service 'between any points not in excess of 1700 statute miles from Tafuna Airport, American Samoa.'" (footnotes omitted)

compels us to manufacture such difficulties in certificating supplemental air service." (R. 1131A)

It would seem to be clear that the Board is right and that the court below reads the statute in a manner not intended by the Congress.

The provision that "each certificate . . . shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered" is neither so clear nor unambiguous as to leave no room for construction as to its meaning.[11] The lower court plainly erred in its holding that what it deemed to be the "plain statutory terms" must be given their literal application "unless the inadvertent result of plain wording is absurd when applied to certain facts." Rather, "[e]ven when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose rather than the literal words." *U. S. v. Amer. Trucking Assn's*, 310 U.S. 534, 543. In "expounding a statute," the Court "must not be guided by a single sentence or member of a sentence, but must look to the provisions of the whole law, and to its object and policy." *Mastro Plastics Corp. v. Labor Board*, 350 U.S. 270, 285. In the light of the over-all statutory provisions and purposes of the Federal Aviation Act, the Board's construction of its powers seems to be wholly in keeping

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[11] The manner of specification is not enunciated, and the "if any" provision in relation to specification of points could equally apply to both intermediate and terminal points. *See Porto Rico Ry. Co. v. Mor*, 253 U.S. 345, 348; *United States v. Standard Brewery*, 251 U.S. 210, 218.

with the Act and the one most consonant with the statutory pattern and objectives.

The Act clearly contemplates not only the regulation of an existing transportation pattern but also "the encouragement and development of an air transportation system properly adapted to the present and future needs of . . . commerce . . . and of the national defense." The statutory purposes are defeated by a construction of the statute which freezes the development of an air transportation system to regular route services, and prevents the development of supplemental and special services. Such a highly developmental statute as the Federal Aviation Act was not designed merely to maintain the *status quo* as it existed twenty years ago.

It is submitted that the statute, in the light of the legislative history, shows that certificates for supplemental services were to be issued, as soon as the Board decided the public interest required such action. One of the chief draftsmen of the bill which became the Civil Aeronautics Act explained the purposes of the exemption provision (Section 416(b)) under which the supplemental carriers have heretofore operated, as follows:

> "Mr. Fagg. The definition of the term 'air carrier' given is so broad that it would include both carriers on scheduled and carriers not on scheduled routes, and we had two alternatives, one making this whole act apply to scheduled air-line operations and leaving out any regulatory provisions whatsoever for carriers not on schedule or including a broad definition and then caring for the immediate circumstances by allowing exemptions.
>
> "Now obviously, while we might follow the provisions of the Motor Carrier Act with regard to contract carriers and that sort of thing and get

> down to the point where a certificate of convenience might even be issued to charter operators or those not on schedule, we thought that at the present time there was no need for that, and as a matter of fact it probably would work undue hardship both on the Authority representing the Government and on the carrier. Therefore this provision has been put in to exempt from any requirement of a certificate of convenience of that type of carrier until it is found to be in the public interest."[12]

In furtherance of this purpose, Section 416(b) provides for exemption from the provisions of the Act, including the certificate requirement, if the Board finds that the provision in question constitutes an "undue burden . . . and is not in the public interest." If the Board cannot so find, the certification requirement applies to the common carriage by air involved, and certification is clearly indicated if the service is in the public convenience and necessity. That was the view held by the Court of Appeals when the case was before it the first time (*American Airlines* v. *Civil Aeronautics Board*, 235 F. 2d 845), and it is no less valid now.

The fundamental issue here presented is one which should be resolved by this Court.

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[12] Hearings before the House Interstate and Foreign Commerce Committee on H.R. 9738, 75th Cong., 3d Sess., 420-421 (1938). See, also, Cong. Rec. 6726; Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess., pp. 3-4. The bill was drafted by an "Interdepartmental Committee" composed of representatives of Government departments, and Mr. Fagg, one of the draftsmen, was Director of the Bureau of Air Commerce, the then safety regulatory agency.

C. The tests of fitness and ability.

An equally important divergence of opinion is found in the qualification issue of this case. And, here, Circuit Judge Fahy disagreed with the two other judges. The court below did not look at the situation as being one for the expert judgment of the Board, but, instead, substituted its own judgment. The substantiality of this argument can be made clear by a brief reference to the facts. The supplemental carriers have been operating for many years, with the same operating authority to provide service as they would have under their certificates. The Board simply changed their licenses from exemptions to certificates. The court said that in so doing, the Board had not only to reassess the ability of the carriers, which the Board did, but also the Board must determine if each carrier was qualified to provide the maximum service authorized. The Board, on the other hand, interpreted the statute to mean that if a carrier were qualified to provide and had been providing supplemental service, then a certificate could be issued. The court below was unfamiliar with the living practices of the industry.

It is true that a few supplemental carriers which had been performing small or specialized service were found qualified for full supplemental authority. But, the certificate of public convenience and necessity is only an economic operating authority. Before a carrier can utilize different equipment in its service, it must first obtain the proper safety authority from the Administrator of the Federal Aviation Agency. The Board was aware of this, but the court below apparently was not.

The supplemental carrier can be described as the "tramp steamer of the air." Supplemental carriers

provide service in many markets on a seasonal basis, and in others on a contract basis for the national military establishment.

Some of the supplemental carriers in the past have concentrated on charter service, others on individually-ticketed service; some are predominantly cargo carriers, others, predominantely passenger carriers. All of those which received certificates were operating, or had operated, large transport aircraft. Some will continue to be large operators while others will be smaller. They are taken together, as a class, because of their flexibility of operations and their ability to shift operations from place to place, and because the public demand for their services is similarly fluctuating and unpredictable.

There was no showing, and there could not have been, that a carrier able to operate transport aircraft between Miami and New York for example, lacked the ability to operate between New York and San Francisco. See *Civil Aero. Bd.* v. *State Airlines, Inc.*, 338 U.S. 572, 581.

To require a carrier to prove anew its fitness and ability every time it changes its area of operations would be an intolerable and unreasonable burden on both the carrier and the Board. Yet, that is what the court below would require, and that is apparently why Circuit Judge Fahy dissented. The problem of interpreting the meaning of the statute in the field of supplemental service should not be resolved by a two-to-one decision in the Court of Appeals; this court should speak in order that the industry and the regulatory agency will be advised of the proper meaning.

III. THE COURT OF APPEALS HAS DECIDED THE CASE IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A principal question in this case is the power of the Board to "specify the service to be rendered" in the light of the other provisions of the Act.

The leading case on this subject is *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943). There, this Court upheld the right of the Interstate Commerce Commission to issue a certificate for the transportation of not more than six passengers in any one vehicle. It was argued that the proviso in Section 208(a) of the Motor Carrier Act (Appendix, p. 5a) prevented the Commission from limiting the number of passengers to be carried in one vehicle, because it was in effect a limitation on the right of the carrier to add to or change equipment.

The three-judge district court held that the condition confining the service to cars holding not more than six passengers was a proper description of the service to be rendered as provided by the statute. This Court affirmed, saying:

> "We are of the view that the power of the Commission to limit the certificate as it proposes to do is in accord with the purposes of the Motor Carrier Act." (320 U.S. 409)

Further explanation of the difference between a provision inserted in a certificate to specify the service to be rendered and a condition restricting the carrier's right to add to schedules is found in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947). There, this Court drew a distinction between the power of the Interstate Commerce Commission under the Water Carrier Act

and its power under the Motor Carrier Act. The Court held that the Water Carrier Act does not require the Commission to "specify the service to be rendered" and, therefore, the rationale of the *Crescent Express* decision does not apply to certificates issued to water carriers. On the other hand, the Federal Aviation Act in express terms does require the Board to "specify the service to be rendered," and, accordingly, the *Crescent Express* doctrine does apply in aeronautical cases. The statute does not preclude the Board from inserting descriptive provisions in a certificate so long as such provisions are designed to specify the service to be rendered.

The court below failed to follow the teachings of this Court. Instead, it read the Federal Aviation Act as being like the Water Carrier Act in its restrictions. If it had followed this Court's interpretation of the Motor Carrier Act, as it should have done, it would have reached a different result in the air transportation field.

CONCLUSION

Because the court below has decided an important question of Federal law which is probably in conflict with the decisions of this Court, has interpreted the Federal Aviation Act of 1958 in such a manner as to prevent the Civil Aeronautics Board from issuing certificates of public convenience and necessity for services which the public convenience and necessity require, and has construed the statutory terms in a manner which will retard the development of an adequate air

transportation system, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

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June 6, 1960

APPENDIX

APPENDIX

Pertinent Statutes

28 U.S.C.A. Section 1254 (1). Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Federal Aviation Act of 1958:

Declaration of Policy: The Board

Sec. 102. In the exercise and performance of its powers and duties under this Act, the Board shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic com-

merce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil aeronautics.

Certificate of Public Convenience and Necessity

Certificate Required

Sec. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

Issuance of Certificate

(d) (1) The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate authorizing the whole or any part thereof for such limited periods as may be required by the public convenience and necessity, if it finds that the applicant is fit, willing, and able properly to perform such transportation and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder.

Terms and Conditions of Certificate

(e) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air

transportation and the service to be rendered; and there shall be attached to the exercise of the privileges granted by the certificate, or amendment thereto, such reasonable terms, conditions, and limitations as the public interest may require. A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place without the United States, designate the terminal and intermediate points only insofar as the Board shall deem practicable, and otherwise shall designate only the general route or routes to be followed. Any air carrier holding a certificate for foreign air transportation shall be authorized to handle and transport mail of countries other than the United States. No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules, equipment, accommodations, and facilities for performing the authorized transportation and service as the development of the business and the demands of the public shall require. No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off during an emergency at a point not named in its certificate or by operating in an emergency under regulations which may be prescribed by the Board, between terminal and intermediate points other than those specified in its certificate. Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board.

Exemptions

Sec. 416. (b) (1) The Board, from time to time and to the extent necessary, may (except as provided in paragraph (2) of this subsection) exempt from the requirements of this title or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder, any air carrier or class of air carriers, if it finds that the enforcement of this title or such provision, or such rule, regulation, term, condition, or limitation is or would be an

undue burden on such air carrier or class of air carriers by reason of the limited extent of, or unusual circumstances affecting, the operations of such air carrier or class of air carriers and is not in the public interest.

(2) The Board shall not exempt any air carrier from any provision of subsection (k) of section 401 of this title, except that (A) any air carrier not engaged in scheduled air transportation, and (B), to the extent that the operations of such air carrier are conducted during daylight hours, any air carrier engaged in scheduled air transportation, may be exempted from the provisions of paragraphs (1) and (2) of such subsection if the Board finds, after notice and hearing, that, by reason of the limited extent of, or unusual circumstances affecting, the operations of any such air carrier, the enforcement of such paragraph is or would be such an undue burden on such air carrier as to obstruct its development and prevent it from beginning or continuing operations, and that the exemption of such air carrier from such paragraphs would not adversely affect the public interest: *Provided*, That nothing in this subsection shall be deemed to authorize the Board to exempt any air carrier from any requirement of this title, or any provision thereof, or any rule, regulation, term, condition, or limitation prescribed thereunder which provides for maximum flying hours for pilots or copilots.

Certification or Certiorari

Sec. 1006. (f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

Motor Carrier Act

Terms and Conditions of Certificate

Sec. 208. [August 9, 1935.] [49 U.S.C., § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204 (a) (1) and (6): *Provided, however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

On petitions for review of orders of the Civil Aeronautics Board.

Before: Prettyman, Chief Judge, and Wilbur K. Miller and Fahy, Circuit Judges.

JUDGMENT

These cases came on to be heard on the record from the Civil Aeronautics Board, and were argued by counsel. On Consideration Hereof, it is ordered and adjudged by this court that the orders of certification embraced in order No. E 13436 of the Civil Aeronautics Board on review in these

cases are set aside and that the proceedings are remanded for further proceedings not inconsistent with the opinion of this court.

Per CHIEF JUDGE PRETTYMAN

Dated: April 7, 1960

Separate opinion of Circuit Judge Fahy concurring in the result and generally in the opinion.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15025

UNITED AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15027

EASTERN AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15032

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15034

PETITIONERS

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, ET AL.,

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, UNITED STATES OVERSEAS AIRLINES, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15035

TRANS WORLD AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRLINES, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15045

AMERICAN AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., UNITED STATES OVERSEAS AIRLINES, INC., SUPPLEMENTAL AIR CARRIER CONFERENCE, MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15047

DELTA AIR LINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

QUAKER CITY AIRWAYS, INC., MODERN AIR TRANSPORT, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15050

NORTHWEST AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

No. 15051

NATIONAL AIRLINES, INC., PETITIONER

v.

CIVIL AERONAUTICS BOARD, RESPONDENT

MODERN AIR TRANSPORT, INC., QUAKER CITY AIRWAYS, INC., ALL AMERICAN AIRWAYS, INC., ET AL., INTERVENORS

On Petitions for Review of Orders of the Civil Aeronautics Board

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Decided April 7, 1960

Mr. Robert L. Stern, with whom *Mr. William M. Dickson* was on the brief for petitioner in No. 15025, argued for all petitioners. *Mr. James Francis Reilly* also entered an appearance for petitioner in No. 15025.

Mr. E. Smythe Gambrell was on the brief for petitioner in No. 15027.

Messrs. Robert C. Barnard and *John C. Pirie* were on the brief for petitioner in No. 15032.

Mr. J. D. Feeney, Jr., was on the brief for petitioner in No. 15034.

Mr. James K. Crimmins was on the brief for petitioner in No. 15035. *Mr. James P. Simpson* also entered an appearance for petitioner in No. 15035.

Messrs. Howard C. Westwood and *William H. Allen* were on the brief for petitioner in No. 15045. *Messrs. Gerry Levenberg* and *Alfred V. J. Prather* also entered appearances for petitioner in No. 15045.

Mr. R. S. Maurer was on the brief for petitioner in No. 15047. *Messrs. Joseph J. O'Connell, Jr., Robert Reed Gray* and *James W. Callison* also entered appearances for petitioner in No. 15047.

Mr. C. Edward Leasure was on the brief for petitioner in No. 15050.

Mr. Richard A. Fitzgerald was on the brief for petitioner in No. 15051. *Mr. Andrew T. A. MacDonald* also entered an appearance for petitioner in No. 15051.

Mr. O. D. Ozment, Associate General Counsel, Litigation and Research, Civil Aeronautics Board, with whom *Mr. Franklin M. Stone*, General Counsel, Civil Aeronautics Board, *Mr. John H. Wanner*, Deputy General Counsel, Civil Aeronautics Board, *Mr. Robert L. Toomey*, Attorney, Civil Aeronautics Board, and *Mr. Richard A. Solomon*, Attorney, Department of Justice, were on the brief, for respondent.

Mr. Albert F. Beitel, who was on the brief for intervenor Modern Air Transport, Inc., and certain other intervenors, argued for all intervenors.

Mr. Dewitt T. Yates was on the brief for intervenor United States Overseas Airlines and also entered an appearance for intervenor Supplemental Air Carrier Conference in Nos. 15034, 15035, and 15045. *Mr. Henry F. Eaton* entered an appearance for intervenors United States Overseas Airlines and Supplemental Air Carrier Conference in Nos. 15034, 15035, and 15045.

Before PRETTYMAN, *Chief Judge*, and WILBUR K. MILLER and FAHY, *Circuit Judges*.

PRETTYMAN, *Chief Judge:* This is another phase of the problem of the supplemental air carriers.[1] The Board decided to certificate in this service those carriers which qualified for certification under its views of the criteria for qualification. Accordingly it issued certificates to certain of our intervenors here (Order No. E-13436). Those certificates purported to authorize operation "[b]etween any point in any State of the United States or in the District of Columbia, and any other point in any State of the United States or in the District of Columbia, with respect to persons and property."

The authority to issue certificates is conferred on the Board by Section 401 of the Federal Aviation Act of 1958.[2] Paragraph (e) of that Section provides in part:

> "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; * * *."

---

[1] Large Irregular Carriers, Exemptions, 11 C.A.B. 609 (1950); American Airlines v. Civil Aeronautics Board, 98 U.S. App. D.C. 348, 235 F. 2d 845 (D.C.Cir. 1956).

[2] 72 STAT. 754, 49 U.S.C., § 1371 (1958).

It seems plain beyond possibility of debate that a blanket authorization to operate between any two points in the United States is not a specification of the terminal points and the intermediate points, if there be any intermediate stopping points, of the operation. The legislative history supports this clear reading.

The certificates issued here also contained a limitation of the operation to ten flights each calendar month in the same direction between the san. two points. Section 401(e) of the Act contains this provision: "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules . . . ." Failure of these certificates to observe this prohibitive restriction seems clear.

The Board and the intervenors argue that supplemental air service is in the public interest and that the over-all statutory scheme and the legislative history indicate an intention on the part of the Congress to empower the Board to issue certificates when it finds certificates to be in the public interest. But these generalities of intent and history cannot strike from a statute peremptory, unambiguous directives. If the requirements of Section 401(e) interpose an insuperable obstacle to the full development of supplemental air service, which they may well do, the problem is for the Congress. The Board should present it there. The courts cannot rewrite plain statutory terms, unless the inadvertent result of plain wording is absurd when applied to certain facts.

Section 401(d)(1) of the Act provides that

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly . . . ."

The Board gave the same nationwide cargo and passenger authority to each of the applicants to which it issued

certificates. In many instances the prior operations of individual applicants had been small or specialized, and in many instances the financial resources, adequate for the types of operations theretofore conducted by the carriers, were obviously inadequate for operations of the scope authorized by the certificates.

The Board argues that it gave weight to "going-concern" status (which petitioners call the "renewal" aspect) and careful consideration to the carriers' financial position and managerial make-up. But we think some effect must be given the word "such" in the above-quoted part of Section 401(d)(1). The applicant must be found fit, willing and able to perform "such" transportation, obviously referring to the transportation authorized by the certificate. Since these certificates were nationwide in scope and broad in authority, the qualifications of the applicants for that sort and kind of operation is the statutory prescription. Within that general concept, going-concern status and financial position are important considerations. But they must be considered only in so far as they indicate qualifications for the operation authorized in the certificate. Those considerations in less expansive measure might well be the criteria for more limited certifications.

The Board says that, based upon experience with these carriers, it determined that authority for these supplemental operations need not, and should not, be parcelled out in limited segments of the over-all supplemental picture. The Board says it concluded that the certification of a number of carriers, left basically free to pick and choose for themselves the phases of the program in which they would operate, would best meet the needs of the public. But the Congress put into its statute clear requirements as to certificates, and those requirements for specified terminal points and intermediate points, if any, are counter to the sweeping pick-and-choose concept which

the Board says guided it. It may be that the supplemental air carrier problem had not fully developed when the original statute was enacted,[3] or if may be that Congress meant the pattern to be precisely as it delineated it, but in either event a scheme of certification different from the one Congress spelled out is a problem for the Congress.

We do not have before us in the present case exemption authority under Section 416 of the Act and so express no opinion on that matter.

The orders of certification embraced in Board Order No. E-13436 must be set aside and the proceedings remanded.

The petitions for review also include an order of the Board[4] which denied petitioners motions for reconsideration of the orders of the Board entered in 1955.[5] Those orders were set aside by this court in *American Airlines v. Civil Aeronautics Board*.[6] But the Board says its underlying findings of a public necessity for a supplemental air service were not disturbed by this court's opinion and decision, and remain available as a premise for its new order[7] granting the certificates. Petitioners say the statute requires a finding of public convenience and necessity for each grant of a certificate, *i.e.*, for each certificated carrier. They therefore say the Board is required to reopen its old orders on this issue. Since we hold that the certificates granted are not authorized, we do not reach the question of the sufficiency of the under-

[3] The predecessor statute, the Civil Aeronautics Act of 1938, did not differ in pertinent part from the current Act.

[4] Order No. E-13435.

[5] Orders Nos. E-9744 and E-9884.

[6] 98 U.S. App. D.C. 348, 235 F.2d 845 (1956).

[7] Order No. E-13436.

lying findings. Moreover we think it is not necessary that the Board reopen the old orders to supply a lack, if any there be, in whatever new orders the Board may issue. The sufficiency of the support of any such new orders must depend upon the nature and extent of the support upon which the Board then relies. That question will arise if such orders are entered and are attacked. We intimate no opinion upon that issue. We regard the problem posed by the challenge to Order No. E-13435 as not now before us, in view of our action in respect to the principal order under review, the order granting the certificates.[8]

Order No. E-13436 set aside and proceedings remanded.

FAHY, *Circuit Judge*, concurring in the result and generally in the opinion: I agree that the order of certification must be set aside and the case remanded. I also agree with the opinion of the court except that I think the Board had adequate basis in the record to find, in accordance with section 401(d)(1) of the Act, that the applicants were fit, willing and able to perform the transportation properly.

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[8] Order No. E-13436.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 129

ALL AMERICAN AIRWAYS, INC., ET AL., *Petitioners*,

v.

UNITED AIR LINES, INC., ET AL., *Respondents*.

MOTION OF PETITIONERS TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 129

ALL AMERICAN AIRWAYS, INC., ET AL., *Petitioners*,

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UNITED AIR LINES, INC., ET AL., *Respondents*.

MOTION OF PETITIONERS TO DEFER CONSIDERATION OF PETITION FOR WRIT OF CERTIORARI

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Come now the Petitioners by their attorneys and respectfully move this Honorable Court to defer consideration of the Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, filed herein on June 6, 1960, and in support of said Motion respectfully state as follows:

I. PERTINENT STATEMENT OF THE CASE

The questions presented to this Honorable Court in the Petition for Writ of Certiorari arise as a result of a proceeding before the Civil Aeronautics Board[1] known as the *Large Irregular Air Carrier Investigation*, docket 5132, *et al.* That proceeding was instituted by the Board in September, 1951 to determine the role of a class of air carriers (now known as supplemental carriers) in the national system of air transportation. (R. 1A)[2]

In 1955, the Board issued an interim opinion which granted certain operating rights to supplemental carriers in the form of individual exemptions. (R. 573A) On review, the United States Court of Appeals for the District of Columbia Circuit reversed the interim decision of the Board for the failure to make sufficient findings to show what circumstances "would make certification an undue burden" on the supplemental carriers so as to warrant the issuance of exemptions.[3]

The Court of Appeals granted a motion concurred in by all parties, which stayed the effect of its judgment and issuance of mandate until the Board issued a final decision in the proceeding.

Thereafter, on January 28, 1959, the Board rendered a final opinion[4] which directed the issuance of cer-

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[1] Sometimes hereinafter called "the Board".

[2] "R" designates the record filed with the Petition for Certiorari.

[3] *American Airlines* v. *Civil Aeronautics Board*, 98 U.S. App. D. C. 348, 235 F. 2d 845 (1956), cert. denied 353 U.S. 905 (1957).

[4] The opinion is "final" as to issues involving interstate air transportation.

tificates of public convenience and necessity (in lieu of the previous exemptions) to the supplemental carriers. (R. 1100A) This time the United States Court of Appeals for the District of Columbia Circuit reversed the decision of the Board on the ground that the Federal Aviation Act of 1958 [49 U.S.C. 1301 *et seq.*, Act of August 23, 1958, 72 Stat. 731] does not empower the Board to issue certificates of public convenience and necessity for supplemental air service.[5] It is this decision which petitioners pray this Court to review, by petition for writ of certiorari filed herein on June 6, 1960. Under Rule 27 of the Rules of the Court of Appeals, the mandate is stayed pending the final disposition of the case by this Court.

By order dated June 17, 1960, the Chief Justice granted the application of the Solicitor General, extending the time for filing petition for certiorari to and including September 3, 1960. The same order extends the time for filing a response to the petition for certiorari filed on June 6, 1960.

II. DEVELOPMENTS SINCE PETITION FOR CERTIORARI WAS FILED

In the meantime, after petitioners filed their petition, the Congress considered two bills which would have affected the petitioners. One would have expressly amended the Federal Aviation Act to remove any doubt of the power of the Board to act as it did. The Senate passed this bill. However, the House refused to follow the Senate action and adopted only stop-gap legislation, (H.R. 7593), which was finally passed

[5] *United Air Lines* v. *Civil Aeronautics Board*, ——— U.S. App. D.C. ———, ——— F. 2d ——— (1960), petition for certiorari filed June 6, 1960.

by the Congress as Public Law 86-661, 74 Stat. 527, and is attached to this motion as Appendix A.

The stop-gap legislation empowers the Board "to validate" for a period "not to exceed twenty months" the certificates of public convenience and necessity which it issued in this case.

III. THE STOP-GAP LEGISLATION DOES NOT RENDER THIS CASE MOOT

The legislation would enable the Board to validate the certificates for a period "not to exceed" twenty months. This merely maintains the situation, for a short time, which existed before the decision of the Court of Appeals. However, your petitioners hold certificates which by their terms will exist for five years, and the Board cannot validate these certificates in their entirety. The legislation does not enable the Board to do all that it has attempted to do in this case. Moreover, there is still pending before the Board the question of the form in which petitioners should receive authority to engage in overseas and foreign air transportation and the decision in this case will undoubtedly govern the Board's action in the part of the case still pending before the Board.

Whether the Congress will consider the matter further is not known; and, it cannot be foretold if the Congress will adopt legislation which would expressly permit the Board to issue certificates for supplemental service. Supplemental service consists of two principal kinds: charter flights without limit as to number, and individually-ticketed flights limited to ten trips per month between the same two points. During the debate on the bill in the House of Representatives, Mr. Collier stated his intention to introduce an amend-

ment to the bill which would confine the supplemental carriers to charter flights and eliminate the individually-ticketed flight authority which the Board has awarded in the certificates issued to the supplemental carriers.[6] A similar statement was made in the Senate debate.[7]

If the result of the legislation is merely to give the Board added authority to issue a certificate of public convenience and necessity for part of the service which the Board has found to be required, and no other change is made in the regulatory statute, or, if legislation is not enacted, there still will remain the issue of the Board's powers under the statute as it presently exists.

Both the Board and your petitioners believe that the Board already has all of the necessary authority to issue certificates for supplemental service and the question remains ripe for consideration by this Court.

In a similar case, this Court recognized that stopgap legislation which merely maintains the status quo does not render a case moot. In *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153 (1958) a unanimous Court held:

> "The statute accordingly operates as a legislatively ordained stay of the Secretary's order insofar as it affects the present respondents and those similarly situated. (citation omitted). In view of the very temporary nature of this legislative 'stay', the automatic resumption of the status quo upon its expiration, and the effect of the order on the respondents, even during the legislative stay, we

[6] Congressional Record—House, June 24, 1960, p. 13222.

[7] Congressional Record—Senate, June 27, 1960, p. 13432.

agree with the parties that the matter before us is not moot." (358 U.S. 168)

The Congress did not intend, by its stop-gap legislation, to affect any existing litigation. In the House debate, specific reference was made to certain pending cases in the following colloquy:

> "Mr. Daddario. Will it prevent their cases being considered in a court of law, even though they are not mentioned in this bill?
>
> "Mr. Williams. No. It does not prevent their cases being considered in a court of law.
>
> "Mr. Harris. Mr. Speaker, will the gentleman yield?
>
> "Mr. Williams. I yield to the gentleman from Arkansas.
>
> "Mr. Harris. Is it not a fact that this bill is very simple in character, and it does nothing except to provide stop-gap legislation? Everything is status quo with reference to this type of carrier for 1 year, giving the Congress an opportunity to try to work it out when we come back next session?
>
> "Mr. Williams. The gentleman has stated the case exactly."[8]

It becomes apparent that this case is not moot.

IV. EFFECT OF STOP-GAP LEGISLATION ON PETITION FOR CERTIORARI

Petitioners recognize the immediate problem of their being able to operate is alleviated by the legislation. Petitioners likewise realize that this Court may not want to consider the petition for certiorari if the Congress will deal further with the matter.

---

[8] Congressional Record—House, June 24, 1960, p. 13221.

Nevertheless, the legal issues continue to be of paramount importance to the entire supplemental air carrier industry, and they are of great importance in connection with the Board's further action on the overseas and foreign-air transportation phases of the case.

If, therefore, the Court does not desire to consider the petition for certiorari at this time, petitioners suggest that the Court defer consideration of the petition for certiorari, and hold it on the docket pending further action by the Congress. In another case involving air transportation, when it appeared that a new development in a case might completely settle the issues, the Court granted certiorari but the case was held in abeyance pending further action by the Board. *W. R. Grace & Co. v. Civil Aeronautics Board*, 145 F. 2d 271, cert. granted 328 U.S. 832, dismissed as moot, 332 U.S. 827.

Here, it would seem to be appropriate to defer consideration of the petition for certiorari. "On occasion a petition for certiorari may be held, without the Court taking any action, until some event takes place which will aid or control the determination of the matter. It may be held until a decision is reached by the Court in a pending case raising identical or similar issues, or until an imminent state court decision is rendered on a controlling issue of state law, or until some anticipated event occurs which may come about on motion of a party (see Murray v. City of New York, 308 U.S. 528, 310 U.S. 610, 311 U.S. 720) or on the Court's own motion." *Supreme Court Practice*, Stern and Gressman (2nd ed., 1954) p. 154.

Wherefore, if the Court does not wish to consider the petition for certiorari at this time, it is suggested

that it be held pending the subsequent events, or, in the alternative, that the petition be granted.

Respectfully submitted,

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JOHN H. PRATT
Counsel for Petitioners

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Appendix A

Public Law 86-661
86th Congress, H. R. 7393
July 14, 1960

AN ACT

To provide that the Civil Aeronautics Board may temporarily authorize certain air carriers to engage in supplemental air transportion, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Civil Aeronautics Board (hereafter in this Act referred to as the "Board") is empowered—

(1) to validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

SEC. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board—

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certificate of public convenience and necessity issued pursuant to

Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, or against the holder of any operating authority conferred under Board Order E-9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the conferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E-9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point.

Approved July 14, 1960

FILE COPY

SEP 1 1960

No. 129

In the Supreme Court of the United States

OCTOBER TERM, 1960

ALL AMERICAN AIRWAYS, INC., ET AL., PETITIONERS

v.

UNITED AIR LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D.C.

FRANKLIN M. STONE,
General Counsel,
JOHN H. WANNER,
Deputy General Counsel,
O. D. OZMENT,
Associate General Counsel,
Civil Aeronautics Board, Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 129

ALL AMERICAN AIRWAYS, INC., ET AL., PETITIONERS

v.

UNITED AIR LINES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD

This case involves an order of the Civil Aeronautics Board granting certificates of public convenience and necessity to numerous air carriers, which had been conducting operations under exemption authority, authorizing them to perform (in many instances, for a five-year period) various services supplemental to those provided by the regular air route operators.[1] The certificates permit an unlimited number of charter flights between any points in the United States and, additionally, flights, not to exceed ten per month between any two points, carrying individually ticketed

[1] The opinion below (*United Air Lines, et al.* v. *Civil Aeronautics Board, et al.*, Nos. 15,025, *et al.*) is set forth in the appendix to the petition for certiorari.

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passengers or individually waybilled cargo. The Court of Appeals determined that the Federal Aviation Act does not permit grant of such certificates, holding that only unrestricted route-type services between specified cities may be authorized by a certificate of public convenience and necessity, and that the Board in any event applied erroneous standards of fitness in licensing the supplemental carriers.

Following the decision below, Congress enacted, and the President approved (on July 14, 1960), Public Law 86–661, set forth in the Appendix, *infra*, pp. 5–7. This statute authorizes the Board to validate, for a period not to exceed twenty months, the certificates which the judgment of the Court of Appeals would set aside. The accompanying legislative reports state that the Act is a "stopgap" designed to provide Congress adequate time to deal with the over-all problem by permanent legislation.[2] In light

[2] See, *e.g.*, House Report No. 1877, 86th Cong., 2d Sess., p. 2, which states as follows:

> PURPOSE OF LEGISLATION—The committee amendment in the nature of a substitute gives the Civil Aeronautics Board temporary authority to permit 25 supplemental air carriers (the so-called nonscheduled airlines) to conduct limited operations for 12 months, despite a ruling of the U.S. Court of Appeals for the District of Columbia Circuit on April 7, 1960, which held that the Board exceeded its authority in granting limited certificates to these carriers.
>
> This stopgap legislation will give the Congress an opportunity to explore in more detail important problems of policy raised by the decision. One of the principal questions involved in any future permanent legislation will be whether or not the Board should be authorized to issue certificates to supplemental air carriers granting limited authority to carry individually ticketed passengers or individually waybilled property between points not specified in the certificate.

of Public Law 86–661, petitioners have suggested to the Court (Motion of August 26, 1960) that if the Court does not now desire to consider the case, it should hold the petition in abeyance pending further action by the Congress.

We agree with petitioners that the case has not yet become moot and that Congress did not intend by its interim legislation to preclude review of the judgment below if the Court deemed such review appropriate. However, it now appears that the problem is not an immediate one (Congress having declared that the Board in all events may validate the conduct of the supplemental operations in question for a period of twenty months) and that Congress proposes to provide a permanent solution before the controversy revives. In light of these developments, the Government has refrained from filing a petition on behalf of the Civil Aeronautics Board.

A question remains, however, as to the appropriate disposition of the petition filed by the supplemental carriers. As already noted, the case is not moot since it cannot be said with certainty that permanent legislation will be enacted. At the same time, it is doubtful that this Court would conclude that it should attempt to resolve difficult statutory questions which, owing to the enactment of interim legislation, are not now pressing and which, in all probability, will be permanently resolved by Congress before the interim legislation expires. In order to preserve their rights, petitioners have suggested that, if the Court decides against granting immediate review, it might appropriately hold the petition until a later date. This, of

course, might entail holding the petition until a subsequent term of Court.

An alternative and, we suggest, a preferable procedure would be to grant the writ, vacate the judgment below and remand the case to the Court of Appeals with instructions to retain jurisdiction until such time as further legislation has been enacted or Public Law 86–661 has expired. Under this procedure, if the case does become moot, the Court of Appeals may thereupon dismiss it. If, on the other hand, the controversy does revive either because of the failure of Congress to enact permanent legislation during the twenty-month period or because of question as to the applicability and effect of new legislation, the Court of Appeals will be free to reconsider its decision and enter a new judgment. Upon entry of such judgment, the parties, of course, would have full opportunity to seek further review by this Court.

Respectfully submitted.

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SEPTEMBER 1960.

APPENDIX

PUBLIC LAW 86-661, 86TH CONGRESS, JULY 14, 1960

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Civil Aeronautics Board (hereinafter in this Act referred to as the "Board") is empowered—

(1) To validate for a period not to exceed twenty months from the date of enactment of this Act, without further proceedings, any temporary certificate of public convenience and necessity for supplemental air transportation issued pursuant to Board Order E-13436 of January 28, 1959, or Board Order E-14196 of July 8, 1959, which certificate has not been revoked or otherwise terminated by the Board on or before the date of enactment of this Act; and

(2) to confer interim operating authority to engage in supplemental air transportation for a period not to exceed twenty months from the date of enactment of this Act upon any person or air carrier which (A) has operated in interstate air transportation as a supplemental air carrier pursuant to authority granted under Board Order E-9744 of November 15, 1955, or (B) has an application for a certificate as a supplemental air carrier pending before the Board on the date of enactment of this Act.

SEC. 2. (a) Nothing in this Act shall be construed to affect the authority of the Board—

(1) to maintain any enforcement or compliance proceeding or action against the holder of a certif icate of public convenience and necessity issued pursuant to Board Order E–13436 of January 28, 1959, or Board Order E–14196 of July 8 1959, or against the holder of any operating authority conferred under Board Order E–9744 of November 15, 1955, which proceeding or action is pending before the Board on the date of enactment of this Act; or

(2) to institute, on or after the date of enactment of this Act, any enforcement or compliance proceeding or action against the holder of any certificate or operating authority referred to in paragraph (1) of this subsection with respect to any violation of (A) the provisions of the Federal Aviation Act of 1958, (B) the provisions of such certificate, (C) the terms of such operating authority, or (D) the regulations of the Board, without regard to when such violation occurred.

Any sanction which the Board lawfully could have imposed on the operating authority of an air carrier for any violation referred to in paragraph (2) of this subsection which occurred before the validation of a certificate of public convenience and necessity for, or before the conferring of any operating authority for, supplemental air transportation under this Act, may be imposed on the operating authority of such air carrier granted under paragraphs (1) or (2) of the first section of this Act.

(b) The authority granted to the Board under this Act shall not affect any other authority of the Board to license air carriers to engage in supplemental air transportation.

(c) Any certificate validated, and any operating authority conferred, by the Board under this Act shall extend to service between the State of Hawaii and the other States of the United States to the extent that such service was authorized pursuant to Board Order E–9744 of November 15, 1955. For the purposes of any such certificate or operating authority, the State of Hawaii shall be considered one point.

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No. 129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

ALL AMERICAN AIRWAYS, INC., et al.,
Petitioners,

v.

UNITED AIR LINES, INC., et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI AND TO MOTION TO DEFER CONSIDERATION THEREOF

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 278 F. 2d 446.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Section 401 of the Federal Aviation Act provides in part:

> (e) "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered * * * ".

The question is whether this allows the Civil Aeronautics Board to issue certificates authorizing carriers to operate between any two points in the United States, without specification.

2. Section 401(e) also provides that

> "No term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules * * * ."

The question is whether a term in the certificate prohibiting more than ten scheduled flights per month between any two points is a restriction upon the right of a carrier to add to or change its schedules, in violation of this provision.

3. Section 401(d)(1) provides that

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly. * * * ."

The Board granted uniform authority to all the supplemental carriers to engage in all types of supplemental service throughout the nation, even though various of them had engaged in only small or specialized operations in the past and had not shown ability to undertake the extensive operations authorized. The question is whether the finding of fitness of each carrier must reasonably relate to all of the transportation which the Board is authorizing it to perform.

STATUTES INVOLVED

The pertinent provisions of the Federal Aviation Act of 1958 are set forth in the appendix to the petition, pages 1a-4a. The provisions principally involved have been set out in the Questions Presented immediately above. The Act of July 14, 1960, empowering the Board to validate the certificates here in issue for twenty months, is printed in the appendices to the Petitioners' Motion to Defer Consideration and the Board's Memorandum.

STATEMENT

This has been a long and involved proceeding, which shall be summarized here only to the extent necessary for present purposes.

In 1951, the Civil Aeronautics Board undertook to investigate the status of and the need for the services of the irregular air carriers. These carriers had been operating without certificates of convenience and necessity, under a blanket exemption from the certificate requirements of the Act which allowed them to engage in air transportation only on an infrequent and irregular (*i.e.*, nonscheduled) basis. This blanket exemption did not distinguish between charter flights (in which the entire capacity of an aircraft was engaged) and flights for the carriage of individually-ticketed passengers or individually-waybilled cargo shipments, both types of service being counted in determining compliance with the authorized scope of operations.

Many carriers submitted applications for certificates or exemption authority for irregular or "supplemental" transportation.[1] After hearing evidence as to some of the individual applicants, the Board limited the proceeding to the general questions as to the need for a class of supplemental carriers. The Board found that there was need for such a class and that each carrier in the class should be authorized to undertake unlimited numbers of charter flights, and up to 10 *scheduled* flights per month, carrying individually-ticketed passengers or individually-waybilled

[1] The Board formerly described these carriers as "irregular;" it now calls them "supplemental."

cargo ("individual sales" flights) between any two points in the United States. The Board reserved final decision until the completion of the record as to whether this authority should be granted by certificate or exemption. It granted an interim exemption to all of the applicants then holding valid authority as irregular air carriers, without regard to their qualifications, to permit them to engage immediately in the operations which the Board said it would grant on final decision. This exemption was set aside by the Court of Appeals in 1956 in *American Airlines* v. *Civil Aeronautics Board*, 235 F. 2d 845 (C.A.D.C.), certiorari denied, 353 U.S. 905. The mandate of the court was stayed pending the conclusion of the administrative proceeding, however, by consent of the parties, so the applicants have continued to operate under the exemption order up to now.

The testimony as to individual applicants was then completed. In 1959 the Board, by a three to two vote, decided to issue certificates of public convenience and necessity to all of the carriers it found qualified. It accordingly granted the approved carriers unlimited charter authority, and permission to operate ten scheduled individual sales flights per month between any two points in the United States. The validity of the individual sales part of the grant of authority has been the principal issue in this litigation. The two dissenters (R. 1258A-1260A) and also the two trial examiners (R. 123A-127A) were of the opinion that the Board lacked legal authority to issue such certificates, for the reasons stated by the court below and summarized in this brief at pages 10-17, *infra*.

Twenty-five of the 54 applicants were found "fit, willing and able," and accordingly granted certificates. Each successful applicant was granted identical operating au-

thority to engage in all of the transportation authorized, despite the fact that many of them could demonstrate only limited experience and qualifications not extending to the whole scope of authority granted. Thus, some of these carriers had previously carried only cargo; some had only operated charter flights; some had only operated in special areas, such as in or near Alaska. A number had very slight resources, or none at all, and had not been operating for some years prior to the Board's decision in 1959. *E.g.*, R. 924A-927A, 1036A-1040A, 1171A-1172A, 960A-961A, 413A-414A, 1163A, 486A-487A, 1168A.

The respondents here filed petitions for review in the Court of Appeals for the District of Columbia. On April 7, 1960, that court set aside the Board's order on the ground that it violated the statute in relation to the three points stated in the Questions Presented (Petition App., pp. 11a-15a).

The Civil Aeronautics Board then made a request for legislative relief from the Congress. On July 14, 1960, Public Law 86-661, 74 Stat. 527, was approved, empowering the Board to validate for twenty months the certificates issued in this proceeding and to grant interim operating authority of the same scope to certain other carriers for the same period.

The petition for certiorari was filed on June 6, 1960. On June 17, 1960, the Chief Justice granted a motion to extend the Civil Aeronautics Board's time to petition until September 3, 1960, and on June 28, 1960, extended the respondents' time to file their brief in opposition to October 3, 1960. The Civil Aeronautics Board has filed no petition for certiorari.

REASONS FOR NOT GRANTING THE WRIT OR DEFERRING CONSIDERATION OF THE PETITION

This is not a case for certiorari, both because Congress has taken the matter in hand and because the issues were decided by the Court of Appeals in the only way the statute permits.

I.

After the decision below, the Civil Aeronautics Board sought to have Congress amend the statute so as to authorize it to issue the type of certificate which it had granted in this case.[2] The legislative history shows that the question was deemed too difficult to be disposed of within a few weeks without full consideration by the Congress of all phases of the problem. Accordingly, Congress in substance authorized the maintenance of the status quo for twenty months to give it ample time to consider the matter carefully.

Both petitioners and the Civil Aeronautics Board recognize that the action of Congress renders the granting of certiorari inappropriate at the present time. They suggest, however, that this Court retain the case on its docket for the twenty-month duration of the recent statute, or vacate the judgment below and order the Court of Appeals to do so. Respondents submit, on the contrary, that the Congressional intervention furnishes an additional ground

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[2] The bill proposed by the Board is set forth in the proceedings before the Senate Committee. Hearings Before the Aviation Subcommittee of the Committee on Interstate and Foreign Commerce on S. 1543, 86th Cong. 2d Sess. 11-13 (1960).

for denying the petition, not for postponing consideration of it.

Respondents agree that the temporary statute does not render the case moot. *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 168 (1958). But the Board's resort to Congress and the enactment of the statute does deprive the case of importance. The practical commitment of Congress to explore the problem and decide what should be done about it within the twenty-month period makes resolution of the legal question by the court as unnecessary then as it is now.

In recommending a twelve-month grant of temporary authority, the House Committee declared (H. Rep. No. 1877, 86th Cong., 2d Sess. 2):

> "This stopgap legislation will give the Congress an opportunity to explore in more detail important problems of policy raised by the decision."

The Conference Committee extended this period from twelve to twenty months (H. Rep. No. 2072, 86th Cong. 2d Sess.). This action was explained by Representative Williams, Chairman of the House Subcommittee and a manager on the part of the House, as follows [106 Cong. Rec. 14693 (daily ed., July 2, 1960)]:

> "The conference agreement is for 20 months. It was agreed that every effort would be made on both sides to expedite consideration of the Board's request for permanent legislation. A number of important policy questions are involved but it is hoped that the Board's proposal can be considered and decided early in the next session. However, if some unexpected delay should be encountered, the amendment agreed to in conference will give us an opportunity to reach an agreement early in the 2d session of the next Congress."

Whether Congress changes the law so as to permit supplemental carriers to operate on regular schedule or refuses to do so, its action or inaction will manifest its intention for the future. If the law is changed, the new provisions will, of course, be controlling. If Congress deliberately decides not to grant the Board the new authority requested, that will also be decisive for the future. There is no reason to believe that Congress will let the matter go by default.

The requests for deferred consideration might have more force if the case were one in which certiorari should be granted, apart from the temporary statute. But the decision below is so clearly required by the language of the Civil Aeronautics Act, on each of the three grounds relied upon by the court below—any one of which would be sufficient for affirmance—that review by this Court is not warranted either now or in the future.[3]

There is no good reason to defer consideration of a non "certworthy"[4] petition in order to await subsequent action by Congress which will make review by this Court even less important and necessary. The Board's sugges-

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[3] Mr. Clayton Burwell, President of the Independent Airlines Association, one of the two associations representing the supplemental air carriers, in asking for Congressional relief from the decision below, stated to the House Committee: "What will probably happen, without boring you with the minute details, I think most lawyers in here have decided, at least I have, there is not one chance in a hundred that the Supreme Court would accept certiorari and overrule the circuit court. In all candor, I just do not think there is a chance. As a lawyer, Mr. Chairman, you know many are called but few are chosen." Hearings Before Subcommittee of the House Committee on Interstate and Foreign Commerce on H.R. 7593, 86th Cong. 2d Sess. 61-62 (1960).

[4] For this useful word, we are indebted to Mr. Justice Harlan.

tion that the judgment below should be vacated and the case remanded to the Court of Appeals to hold until it sees what Congress does has even less to commend it. A proper and correct judgment in a case, which concededly is not moot, should not be set aside; respondents are entitled to the benefit of that judgment, except as Congress provides otherwise, unless it is reversed by this Court as erroneous. If new legislation enlarging the Board's authority is enacted, that will control whether or not the case is retained below. Although action by the Board might be called for, there is no reason to believe that anything would have to be done in the court below to make any new legislation effective. If that should be necessary, appropriate steps can be taken in the court at that time, without vacating its judgment now. If Congress does not change the law, the Court of Appeals should not have to "reconsider its decision and enter a new judgment" as the Government's Memorandum suggests.

II.

The decision below was clearly required by the provisions of the Federal Aviation Act.

A. The first sentence of Section 401(e) reads:

> "Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered * * * ."

Here the Board has authorized the irregular carriers, now called the supplemental carriers, to operate "between any point" in the United States and "any other point" in the United States. R. 1280-A. On its face, this is not a specification of terminal or intermediate points as required by the statutory provision.

The word "specify," according to the authority cited by the Board in its brief below, is defined as

> "To mention specifically, to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize, or to distinguish by words one thing from another."[5]

All of the definitions agree that the essence of "specify" is to mention in a precise and detailed manner. This might not require use of a geographical name if a point were otherwise described, as by latitude and longitude for example. But some kind of specification is essential, and the Board's bare reference to transportation between any points in the United States contains no specification at all.

If there should be any doubt as to what the first sentence of Section 401(e) means, it would be removed by reference to the following sentences in the same paragraph. The next sentence provides:

> "A certificate issued under this section to engage in foreign air transportation shall, insofar as the operation is to take place *without* the United States, *designate the terminal and intermediate points only insofar as the Board shall deem practicable*, and otherwise shall designate only the general route or routes to be followed." (Emphasis supplied.)

In short, outside the United States it is permissible to designate routes instead of points when it is not practicable to name points. Read together with the first sentence, this clearly means that for transportation *within* the United States specific points were to be designated in all instances, with no exception for cases where the Board does not deem this practicable. In the present case, the Board

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[5] Black's Law Dictionary (1951). See to the same effect Webster's New International Dictionary (1957); 39A Words & Phrases (Perm. Ed.) 469 *et. seq.*

thought it impracticable and undesirable to name points or even routes for transportation within the United States, and accordingly did not do so. The Act gives it no such power.

The last two sentences of Section 401(e) contain other exceptions from the requirement that certificated carriers operate only between points named in the certificate. They provide:

> "No air carrier shall be deemed to have violated any term, condition, or limitation of its certificate by landing or taking off *during an emergency at a point not NAMED in its certificate* or by *operating in an emergency* under regulations which may be prescribed by the Board, *between terminal and intermediate points other than those SPECIFIED in its certificate.* Any air carrier may make charter trips or perform any other special service, without regard to the *points NAMED in its certificate,* under regulations prescribed by the Board." (Emphasis supplied.)

The clearly expressed understanding is that, except for emergencies or charter trips, a carrier must stop only at "points named in its certificate."

These passages and others, such as § 405(b), prove that Congress understood that outside of the excepted situations, certificated air carriers were to be authorized to operate only between specified, designated, or named points.

That Congress intended the words of the Act to mean exactly what they say is also shown by the legislative history. The Civil Aeronautics Act was in many respects modeled on the Motor Carrier Act enacted three years before.[8] That Act (49 Stat. 552, 49 U.S.C. § 308(a))

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[8] *Acquisition of Marquette by TWA*, 2 C.A.B. 409, 412 (1940); *American President Lines*, 7 C.A.B. 799, 804 (1947); Hearings on S.2 and S.1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 86, 70, 333 (1937).

authorized area as well as route certificates, and so did some early Civil Aeronautics bills (S. 3027, § 407(a), S. 3420, § 405(e), 74th Cong., 1st Sess.). The area provision was soon deleted from these bills, leaving a requirement that *routes* be specified. (S. 2, 75th Cong., 1st Sess. § 305(e).) The reference to terminal and intermediate points was finally substituted for routes, since Congress was not concerned with the precise course of flight in the air between the termini.[7] Thus Congress deliberately chose not to follow the Motor Carrier scheme permitting designation of areas of operation as distinct from designation of routes or terminal points. The Board's decision in this case not only requires that the Act be construed to allow reference to general areas instead of points but that the whole United States be treated as one area.

In 1943 and 1944 and again in 1954, Senator McCarran and Representative Lea, the chairmen of the committees which had sponsored the 1938 Act, proposed amendments to permit the specification of areas of operation where it was impracticable to specify the points.[8] Rep. Lea referred to the naming of points as an "absolute requirement."[9] These amendments were not adopted by Congress. But even they would not have gone so far as completely to eliminate any specification by allowing the "anywhere to anywhere" flights here authorized by the Board.

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[7] Hearings on S. 2 and S. 1760 before a Subcommittee of Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 432 (1937); H.R. 9738, 75th Cong., 3rd Sess.

[8] S. 1790, 78th Cong., 2d Sess. § 301(f) (1944); H.R. 3420, 78th Cong., 1st Sess. § 6(d) (1943); H. Rep. No. 784, 78th Cong., 1st Sess. 24 (1943); S. 2647, 83rd Cong., 2d Sess. (1954); Hearings on S. 2647 before the Senate Committee on Interstate and Foreign Commerce, 83rd Cong., 2d Sess. 122 (1954).

[9] H. Rep. No. 784, 78th Cong., 1st Sess. 24 (1943).

As recently as last term, in *T. I. M. E., Inc.* v. *United States*, 359 U.S. 464 (1959), this Court dealt with a similar situation. Just as the Civil Aeronautics Act departed from the Motor Carrier Act in the provision here in question, so had the Motor Carrier Act departed from Part I of the Interstate Commerce Act. Proposals to add the omitted reparation provision to the Motor Carrier Act were made and supported by the Commission, but not adopted by Congress. The Court held that this history prevented it from reading the omitted provision into the statute. This decision is equally applicable here.

Petitioners purport to find support for their position that it was intended that the irregulars receive certificates in a single phrase at the end of a paragraph explaining to the House Committee the need for *exemption* authority.[10] But this general statement is nowhere explained, and its meaning in relation to the present problem is certainly not apparent. Neither the speaker nor Congress were focusing upon the problem raised by the requirement that a certificate specify the terminal and intermediate points. To treat this vague expression as sufficient to overcome the specific words of the statute and the history already referred to would, indeed, be far-fetched.[11]

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[10] The representative of the Department of Commerce on the Interdepartmental Committee which drafted the bill which became the Civil Aeronautics Act of 1938, Mr. Fagg, in referring to the exemption provision, said:

> "Therefore, this provision has been put in to exempt from any requirement of a certificate of convenience of that type of carrier until it is found to be in the public interest." (Hearings before the House Interstate and Foreign Commerce Committee on H.R. 9738, 75th Cong., 3d. Sess., 420-421 (1938).

[11] Petitioners, relying on two or three cases involving Alaska and Samoa in which the Board authorized service between all points in certain areas in or near the territory, assert that "the court below

B. The fourth sentence of Section 401(e) provides that "no term, condition, or limitation of a certificate shall restrict the right of an air carrier to add to or change schedules * * *." No one has denied that the certificate here limiting the applicants to 10 flights per month between any two points does restrict the right to add to schedules.

But it is argued that the first sentence of Section 401(e) says that every certificate shall specify (in addition to the points) "the service to be rendered," and that so long as the prohibition against restricting the right to add schedules can be characterized as a part of the definition of the service, it is lawful. Any such reading would completely emasculate the prohibition in the fourth sentence, since the provisions of a certificate limiting schedules could always be described as a specification of the service to be rendered.

Obviously Section 401(e) has to be read as a whole. The first sentence, saying what a certificate *shall* contain, refers generally to the service to be rendered. The fourth sentence lists a few specific things which a certificate *shall not* contain. As experience has demonstrated, this leaves ample play for the issuance of lawful certificates. The only sensible reading of these sentences together is that certificates may describe services in any way except those prohibited by the fourth sentence.

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overturned a long-established administrative policy." The rulings as to such territories as Alaska and Samoa do not conceivably support the certificates for "anywhere to anywhere" flights in the United States granted by the Board here. Furthermore, so far as appears, no one raised the present problem in those cases. It was not mentioned in the Board's opinions and no one objected to the Board's decision. In other cases, the Board had repeatedly stated that it was "necessary to designate points." *Pan American Airways*, 1 C.A.A. 118, 129 (1939); *American Airlines, New York Operations*, 1 C.A.A. 480, 487 (1939); *Panagra Terminal Investigation*, 4 C.A.B. 670, 674 (1944).

Furthermore, the legislative history shows that the fourth sentence in Section 401(e) was added to the statute in 1938 precisely for the purpose of making clear that the broad words "service" in the first sentence should not be construed to allow the Board to control "the number of schedules to be flown."[12]

Subsequently, in 1949 and 1954, two Board members and the Board's general counsel told Congressional committees that the Act prohibited the Board from limiting the number of schedules which a carrier may operate.[13] The Board's general counsel in 1954, when testifying as to the possibility of certificating the irregular carriers, said:

> "Of course, even if you succeed in defining the class of service you cannot limit the number of schedules provided in that class of service nor could the Board disregard the other limitations that are specifically prohibited in Section 401(f) [now Section 401(e)]."[14]

These statements were made with particular reference to the irregular carrier problem with which this case is concerned. The Board was seeking authority to grant the kind of certificate it purported to grant in 1959 without benefit of the amendatory legislation it requested, and which Congress did not enact.

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[12] Hearings on S. 2 and S. 1760 before a Subcommittee of the Senate Committee on Interstate Commerce, 75th Cong., 1st Sess. 338, 341-342, 346, 518 (1937).

[13] Hearings pursuant to S. Res. 50 before the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess. 49 (1949); Hearings on S. 2647 before the Senate Committee on Interstate and Foreign Commerce, 83d Cong., 2d Sess. 1236, 1233-1234, 692 (1954).

[14] *Id.* at 1236.

Petitioners claim that the decision below conflicts with *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943). In that case the Court held that the provision of the Motor Carrier Act prohibiting the ICC from restricting the right of a carrier "to add to its equipment" did not prevent the Commission from limiting the applicant to vehicles carrying no more than 6 passengers—*i.e.*, to limousines but not buses. The Court stated (320 U.S. at 408-9):

> "We agree with the Commission that the proviso is a prohibition against a limitation on the addition of *more vehicles* of the authorized type, not a prohibition of the *specification of the type*." (Emphasis supplied)

Since this case is concerned with a certificate restricting the addition of *more* schedules, the Court's holding that the ICC is barred from such a quantitative provision shows that *Crescent* supports the position of respondents, rather than petitioners.[15]

C. Section 401(d) provides:

> "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly * * *."

The Board here granted all the approved supplemental carriers the same authority to carry passengers and cargo by charter or by individually ticketed or waybilled flights anywhere in the United States, subject to the ten flight limitation for the non-charter operations. As the court below said, (Petition, App. 13a):

> "In many instances the prior operations of individual applicants had been small or specialized, and in

[15] *Los Angeles Airways Renewal Case*, Order E-12832, July 28, 1958, also relied on by petitioners, is distinguishable for the same reason.

many instances the financial resources, adequate for the types of operations theretofore conducted by the carriers, were obviously inadequate for operations of the scope authorized by the certificates."

For example, Sourdough Air Transport (R. 1036A-1040A, 1075A, 1171A-1172A) operated in Alaska between 1947 and 1949, and 1952 and 1953, but not since, at a small profit. Its present net worth of $19,000 was predicated upon the repair of a wrecked DC-3 which it had bought for $75. The Board found that while repairs would cost $50,000, the value of the repaired aircraft could easily exceed that: Sourdough's future plans were limited to operation of two DC-3s between Seattle and Alaska. Another approved carrier, Arctic Pacific (R. 924A-927A, 1070A, 1073A), had carried only cargo in Alaska up to 1952, had not operated as an irregular carrier since then, and planned only to transport cargo in the future. It lost $7,000 in small plane operations in 1956, and its net worth at the last time of record was $10,000.[16]

Nevertheless, these applicants were authorized to engage in cargo and passenger operations, both charter and individual sales, anywhere in the United States. Their resources and indeed their operating plans and organization are obviously not sufficient for any such wide-spread operation. There is no relationship between the fitness and ability—and even the willingness of these applicants—and the scope of the authority granted.

What the Board has done is to find that each of various applicants has resources and experience to perform a part of the service authorized, and then has authorized each to do anything which any member of the group was qualified to do. This cannot be reconciled with the statutory

[16] All of these facts are taken from the Board's findings.

requirement that each applicant must be fit and able to perform the service authorized—which obviously means all of it.

Section 401(d) says that the Board shall issue a certificate authorizing transportation, if it finds that the applicant is "fit, willing and able to perform *such* transportation." (Emphasis supplied.) The fitness and ability must be for "the transportation authorized by the certificate," as the Court below held (Petition, App. 13a). This would be obvious as a matter of sense even if the statute were not perfectly clear. These applicants are plainly not fit, willing and able to perform the transportation authorized by the Board.

This is not a technical objection. Financial resources proportional to the service authorized are essential to the protection of the public. Experience with other irregular carriers had proved what happened when carriers were inadequately financed. Passengers whom an airline was unable to carry for one reason or another did not obtain refunds or had difficulty in doing so. Passengers stranded by bad weather were not taken care of by the airline. These facts are set out in greater detail in the findings (R. 735A-736A, 195A-196A, 271A-272A).

The Court below was unquestionably correct in setting aside the Board's order. The language and history of the Act are so clear-cut in relation to the issues discussed that there would be no point to further review by this Court. The fact that Congress has, in effect, stayed the decision below, so that it can consider the problem itself and determine whether the law should be changed, does not make the case more suitable for certiorari, but the contrary.

CONCLUSION

For the above reasons, the motion to defer consideration and the petition for certiorari should both be denied.

Respectfully submitted,

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